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Tan Poh Lee v Tan Boon Thien

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO W-02(i)-45–09 OF 2020(W)
NALLINI PATHMANATHAN, VERNON ONG AND ZALEHA YUSOFF FCJJ
18 FEBRUARY 2021

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Civil Procedure — Contempt of court — Contempt proceedings — Failure of respondent to comply with conditional stay order — Court of Appeal set aside motion to commence committal proceedings — Whether prior notice to show cause to be given to proposed contemnor before filing of ex parte leave application under O 52 r 3 of Rules of Court 2012 ('the ROC') — Whether notice to show cause referred to in O 52 r 2B of the ROC meant documents referred to in O 52 r 4(3) of the ROC — Rules of Court 2012 O 52 r 2B

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E The Court of Appeal had set aside the motion to commence committal proceedings brought by the appellant against the respondent, for failure of the respondent to comply with a conditional stay order. The Court of Appeal decided that the appellant failed to issue a notice to show cause mandatorily required under O 52 r 2B of the Rules of Court 2012 ('the ROC'). The Court

F of Appeal went on to add that the rules committee had enacted r 2B with the express purpose of the proposed contemnor being given an opportunity of answering to the notice before any application for leave for contempt was made. The leave application, it was held, could only be made after issuance of the notice and the appropriate time had lapsed, and where the proposed

G contemnor had given no reply or no satisfactory reply. The further basis for this construction was stated to be that as contempt attracted penal sanctions, any ambiguity had to be resolved in favour of the alleged contemnor. Hence, this appeal. The questions of law that arose for consideration were whether on a true construction of O 52 r 2B of the ROC: (a) prior notice to show cause was

H to be given to a proposed contemnor before the filing of an ex parte leave application under O 52 r 3 of the ROC; and (b) the notice to show cause referred to in O 52 r 2B of the ROC meant the documents referred to in O 52 r 4(3) of the ROC.

I **Held**, allowing the appeal and setting aside the order of the Court of Appeal with costs of RM50,000:

(1) The notice to show cause referred to in O 52 r 2B of the ROC referred to the documents stated in O 52 r 4(3) of the ROC, particularly the notice of application itself. If O 52 r 2B of the ROC was construed otherwise, it

would require a litigant seeking to enforce a court order (which ought to be complied with expeditiously, if not forthwith) to send a pre-notice as a mandatory requirement, before being able to even initiate committal proceedings, notwithstanding that both the litigant and the alleged contemnor were fully aware of the order of court. Any such commencement of contempt proceedings in turn, would require further compliance with O 52 r 4(3) of the ROC, which meant that the documents specified there would have to be served personally a second time. The time expended would be far too long. There would, moreover, be surplusage in the need for a pre-notice followed by further personal service in relation to the documents under O 52 r 4(3) of the ROC (see paras 11–14).

(2) While contempt proceedings may well entail criminal consequences, and that great care must be taken in contempt proceedings, bearing in mind the possible consequences to the liberty of a person, such consideration must be balanced against the equally important requirement that court orders must be complied with strictly. There was no basis on which to construe O 52 r 2B of the ROC as imposing a further mandatory requirement for a pre-notice prior to even initiating contempt proceedings against a contemnor who had been party to, and therefore was fully conversant with an order of court made against him or involving him. Such a construction would defeat the need for prompt and full compliance with orders of court which carried the force of the law (see paras 15–16).

(3) The first question was answered in the negative while the second question was answered in the affirmative (see para 18).

[Bahasa Malaysia summary

Mahkamah Rayuan telah mengetepikan usul untuk memulakan prosiding komital yang dibawa oleh perayu terhadap responden, kerana kegagalan responden mematuhi perintah penangguhan bersyarat. Mahkamah Rayuan memutuskan bahawa perayu gagal mengeluarkan notis tunjuk sebab yang dikehendaki secara mandatori di bawah A 52 k 2B Kaedah-Kaedah Mahkamah 2012 ('KKM'). Mahkamah Rayuan seterusnya menambah bahawa jawatankuasa kaedah-kaedah telah menggubal k 2B dengan tujuan nyata supaya orang yang dikatakan menghina diberi peluang untuk menjawab notis sebelum sebarang permohonan kebenaran penghinaan dibuat. Permohonan kebenaran, ia diputuskan, hanya boleh dibuat selepas pengeluaran notis dan masa yang sesuai telah tamat dan di mana orang yang dikatakan menghina tidak memberikan jawapan atau tiada jawapan yang memuaskan. Asas selanjutnya untuk tafsiran ini dinyatakan sebagai penghinaan yang menarik hukuman jenayah, sebarang kesamaran perlu diselesaikan memihak kepada orang yang dikatakan menghina. Oleh itu, rayuan ini. Persoalan undang-undang yang timbul untuk pertimbangan adalah sama ada pada

tafsiran sebenar A 52 k 2B KKM: (a) notis awal untuk tunjuk sebab akan diberikan kepada orang yang dikatakan menghina sebelum memfailkan permohonan kebenaran ex parte di bawah A 52 k 3 KKM; dan (b) notis tunjuk sebab yang dirujuk dalam A 52 k 2B KKM bermaksud dokumen yang dirujuk dalam A 52 k 4(3) KKM.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Rayuan dengan kos RM50,000:

(1) Notis tunjuk sebab yang dirujuk dalam A 52 k 2B KKM merujuk kepada dokumen yang dinyatakan dalam A 52 k 4(3) KKM, khususnya notis permohonan itu sendiri. Jika A 52 k 2B KKM ditafsirkan sebaliknya, ia memerlukan pelitigasi yang ingin menguatkuasakan perintah mahkamah (yang sepatutnya dipatuhi dengan segera, jika tidak serta-merta) menghantar pra-notis sebagai keperluan mandatori, sebelum boleh memulakan prosiding komital, walaupun kedua-dua pelitigasi dan orang yang dikatakan menghina mengetahui sepenuhnya perintah mahkamah. Sebarang permulaan prosiding penghinaan sedemikian seterusnya, memerlukan pematuhan lanjut dengan A 52 k 4(3) KKM, yang bermaksud bahawa dokumen yang dinyatakan dalamnya perlu diserahkan secara kendiri untuk kali kedua. Masa yang diluangkan akan menjadi terlalu lama. Lebih-lebih lagi, terdapat lebihan dalam keperluan untuk pra-notis diikuti dengan serahan kendiri selanjutnya berhubung dengan dokumen di bawah A 52 k 4(3) KKM (lihat perenggan 11–14).

(2) Walaupun prosiding penghinaan mungkin melibatkan akibat jenayah, dan bahawa prosiding penghinaan mesti dijalankan dengan berhati-hati, dengan mengambil kira kemungkinan akibat kepada kebebasan seseorang, pertimbangan sedemikian mesti diimbangi dengan keperluan yang sama penting bahawa perintah mahkamah mesti dipatuhi dengan tegas. Tidak ada asas untuk menafsirkan A 52 k 2B KKM sebagai mengenakan keperluan mandatori lanjut untuk pra-notis bahkan sebelum memulakan prosiding penghinaan terhadap penghina yang telah menjadi pihak, dan oleh itu faham sepenuhnya dengan perintah mahkamah yang dibuat terhadapnya atau melibatkannya. Tafsiran sedemikian akan menggagalkan keperluan untuk pematuhan segera dan sepenuhnya terhadap perintah mahkamah yang menjalankan kuasa undang-undang (lihat perenggan 15–16).

(3) Soalan pertama dijawab secara negatif manakala soalan kedua dijawab secara afirmatif (lihat perenggan 18).]

Cases referred to

Tang Hak Ju v Pengarah Tanah dan Galian Pulau Pinang & Ors [2016] MLJU 695; [2017] 2 CLJ 345, HC (folld)

Legislation referred to

Rules of Court 2012 O 52, rr 2A, 2B, 3, 4, 4(3)

Appeal from: Civil Appeal No W-02(IM)(NCvC)-2540–12 of 2018 (Court of Appeal, Putrajaya)

Michael Chow (Sunita Sankey with him) (Liza Khan & Shankey) for the appellant.

Vijaya Segaran (Aaron Mathews and Darmain Segaran with him) (Aaron Mathew) for the respondent.

Nallini Pathmanathan FCJ:

INTRODUCTION

[1] Two questions of law arose for consideration before us in this appeal:

(a) whether on a true construction of O 52 r 2B of the Rules of Court 2012, prior notice to show cause is to be given to a proposed contemnor before the filing of an ex parte leave application under O 52 r 3 of the Rules of Court 2012; and

(b) whether on a true construction of O 52 r 2B of the Rules of Court 2012, the notice to show cause referred to in O 52 r 2B, means the documents referred to in O 52 r 4(3) of the Rules of Court 2012.

BACKGROUND

[2] On 30 September 2019 the Court of Appeal set aside the motion to commence committal proceedings brought by the appellant against the respondent, for failure of the respondent to comply with a conditional stay order dated 21 February 2019. The condition imposed for the stay was that the status quo of the assets relating to a pending probate action were to be preserved. There was an alleged contravention of that condition by the respondent.

THE DECISION OF THE COURT OF APPEAL

[3] The sole ground on which the Court of Appeal set aside the leave previously granted, was that the appellant failed to issue a *notice to show cause* seemingly mandatorily required under the Court of Appeal's construction of O 52 r 2B of the Rules of Court 2012. The rationale as gleaned from the written grounds is that r 2B requires mandatory compliance, and failure to do so would result in all subsequent proceedings being rendered invalid.

[4] The Court of Appeal went on to add that the rules committee had enacted r 2B with the express purpose of the proposed contemnor being given an opportunity of answering to the notice before any application for leave for contempt is made. The leave application, it was held, could only be made after issuance of the notice and the appropriate time had lapsed, and where the proposed contemnor had given no reply or no satisfactory reply. The further basis for this construction was stated to be that as contempt attracted penal sanctions, any ambiguity had to be resolved in favour of the alleged contemnor.

OUR DECISION

[5] It appeared to us that the primary consideration was to ascertain the philosophy or rationale behind O 52 r 2B? As submitted by the appellant, it cannot be construed *in vacuo*. It has to be considered in juxtaposition and contextually with O 52 r 2A. The latter deals with contempt in the face of the court. The contemnor is aware of precisely what it is he has done, and in respect of which he is asked to show cause etc, because a prima facie finding has been made. There is therefore no requirement for a formal notice to be issued by the court.

[6] But not so in a matter where there has been a failure to comply with an order of court. Such a contravention is likely to happen months or even years after the order of court. The alleged contemnor is not before the court.

[7] In such an instance, there is a requirement that the contemnor is appraised of the precise nature of the wrongdoing he is accused of. This is in keeping with one of the twin pillars of natural justice, namely *audi alteram partem*, or simply that the person accused of a wrong must know precisely the charge made against him. Order 52 r 2B is an encapsulation of that principle, so as to ensure that the contemnor is aware of the charge made against him. However, this is not equivalent to a stricture that the alleged contemnor has to be given several notices regarding the alleged contravention.

[8] That does not mean either, that O 52 r 2B encapsulates a strict set of procedures that has to be followed meaninglessly, such that several notices are issued sequentially. The law does not believe in surplusage.

[9] The notice referred to in O 52 r 2B is to be issued at the behest of the court, and not the parties. Private parties do not issue notices to show cause to each other. It is the court that does. It is after all, the order of court which has been breached. And it is therefore the court that ensures compliance and redresses any contravention. And that is therefore what O 52 r 2B is concerned with — ensuring compliance and redressing non-compliance.

[10] It then follows that such a notice can only come into being after the initiation of contempt proceedings by making the requisite application to court. And that is why the notice in O 52 r 2B ties in with the documents referred to in O 52 r 4(3).

[11] In this context, we respectfully concur with the decision of Lim Chong Fong J in *Tang Hak Ju v Pengarah Tanah dan Galian Pulau Pinang & Ors* [2016] MLJU 695; [2017] 2 CLJ 345 that the notice to show cause referred to in O 52 r 2B refers to the documents stated in O 52 r 4(3), particularly the notice of application itself.

[12] If O 52 r 2B is construed otherwise, it would require a litigant seeking to enforce a court order (which ought to be complied with expeditiously, if not forthwith) to send a pre-notice as a mandatory requirement, before being able to even initiate committal proceedings, notwithstanding that both the litigant and the alleged contemnor are fully aware of the order of court.

[13] Any such commencement of contempt proceedings in turn, would require further compliance with O 52 r 4(3), which means that the documents specified there would have to be served personally a second time. And that too for an order of court, to which the alleged contemnor was fully privy, or ought to have notice of.

[14] The time expended would be far too long. There would, moreover, be surplusage in the need for a pre-notice followed by further personal service in relation to the documents under O 52 r 4(3). *After all, it is the failure to comply with the order of court that is the primary subject matter of consideration.*

[15] We concur with the appellant's submissions that while contempt proceedings may well entail criminal consequences, and that great care must be taken in contempt proceedings, bearing in mind the possible consequences to the liberty of a person, such consideration must be balanced against the equally important requirement that court orders must be complied with strictly.

[16] Moreover, the Rules of Court ensure that the potential contemnor is fully safeguarded. This takes the form of O 52 r 3 and r 4. *As such, there is no basis on which to construe O 52 r 2B as imposing a further mandatory requirement for a pre-notice prior to even initiating contempt proceedings against a contemnor who has been party to, and therefore is fully conversant with an order of court made against him or involving him. Such a construction would defeat the need for prompt and full compliance with orders of court which carry the force of the law.*

[17] We therefore conclude that the Court of Appeal erred in focusing solely on the word 'shall' without adequately considering the rationale and purpose of

A the entirety of O 52.

ANSWERS TO THE QUESTIONS OF LAW

[18] We answer the *first question in the negative* and the *second question in the*
B *affirmative*. We therefore allow the appeal and set aside the order of the Court of Appeal with costs of RM50,000 to the appellant subject to allocatur.

Appeal allowed and order of Court of Appeal set aside with costs of RM50,000

C Reported by Ahmad Ismail Illman Mohd Razali

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